

Streamlining and not over-complicating the existing public procurement legislation

Position paper on the announced revision of the public procurement directives and the possible inclusion of further social criteria

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A call to focus on the simplification and implementation of existing legislation

Additional legislation contradicts the current political commitment to reducing the administrative burden for companies. Instead of adding additional social criteria, a thorough analysis of the existing legislation, its difficulties of implementation and extensive data collection should be executed. The next logical steps are, firstly, focusing on the simplification of the existing legislative framework, and secondly, on its implementation.

Background

Commission President von der Leyen announced a revision of the public procurement directives in the political guidelines. The hearings of Executive Vice-President Mînzatu and Executive Vice-President Séjourné also centered on mandatory social criteria to be implemented in the directives.

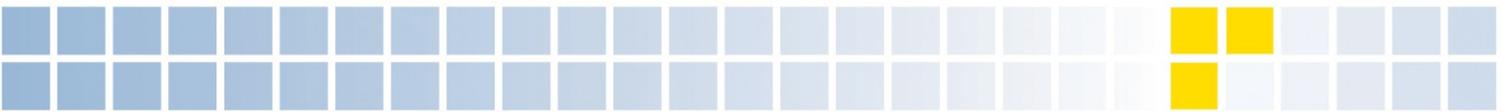
It is important to state: Public procurement is already socially responsible under the existing framework (cf. directive on public procurement [2014/24/EU](#): art. 18(2), 20(1), 43(1), 67(2a), 70). Further provisions on social criteria cannot be implemented: social policy is the responsibility of Member States, not of the EU legislator.

For the public procurement legislation's proper application, simplifying and streamlining is crucial. The public procurement framework should provide legal certainty for companies, without hampering them to participate in public procurement processes. Any revised directive should not overburden procuring authorities with an overcomplex applicable legal framework.

Public procurement is a central issue for the single market. It roughly accounts for 14% of EU GDP. Due to the sheer economic implications, any reforms of the public procurement directives must be conducted with the utmost thoroughness and caution in alignment with better regulation principles. The EU public procurement framework must remain procedural, in other words, the idea of 'how to buy' rather than 'what to buy'.

Core demands

- **A coherent approach** to the revision of public procurement legislation is essential. This means simplifying the procedure while **avoiding overlapping, vague or disproportionate criteria**. Unclear EU rules on scope and coverage lead to risk-averse, box-ticking behaviour and uncertainty.
- It is crucial to keep the **regulatory and administrative burden on companies and public authorities to a minimum** in order to avoid hampering competitiveness.



- Public procurement laws at the EU are **not the right vehicle** to pursue employment, skills or social policy objectives that are disconnected from the performance of public contracts.
- **A clear distinction** needs to be made **between public procurement and social policy objectives**. A public contract sets the conditions for a contract demanded by a public buyer related to a well-defined subject matter and for a given price. Social policy objectives are regulated by numerous European directives and national laws including their application for public procurement procedures.

Why additional social criteria in the public procurement directive are obsolete

- The focus of the revision should be on how to **simplify and streamline the public procurement directives**: The companies and public authorities need more legal certainty regarding the application and varying national transposition of existing optional social criteria in public procurement processes. This problem was already identified in the 2011 impact assessment but still appears to remain unaddressed.
- **Additional social criteria would not solve the problems of implementation**: Additional social conditionalities would not ameliorate the application by public procurement authorities and the number of bidding companies, but **worsen the already complex framework**. This complexity leads to missed opportunities. It hinders public purchasers to effectively apply the legal framework. Member States still rely on the best price as the main criterion. Not considering the circumstances and resources of buyers can lead to **sub-optimal procurement practices**.
- A lot is **already covered by existing legislation**: The current social related provisions of the public procurement directive art. 18(2), 20(1), 43(1), 67(2a), and 70, focus on the most economically advantageous tender including economic, innovation-related, environmental, **social or employment-related considerations**.
- These provisions oblige companies to **act in compliance** with applicable environmental, **social and labour obligations** (EU law, national law, collective agreements and the eight specified core ILO conventions). The latter include, for instance, the ILO conventions no. 100 and no. 111 on equal remuneration and non-discrimination in respect of employment and occupation.
- Existing provisions in the directive also enable public procurers to use **additional instruments for including social criteria**. E.g., the directive on corporate sustainability due diligence (CSDDD) art. 31 already tackles this issue of regulating subcontractors' actual or potential human rights adverse impacts.
- **Collective agreements are key**: Instead of social conditionalities, collective agreements by social partners can address national or sectoral realities and needs best.
- **Collective bargaining agreements must remain optional**: Public procurement shall be accessible to all companies. Freedom of association is mentioned in the ILO Freedom of Association and the Protection of the Right to Organise Convention no. 87 art. 3 and 11 (1948) and the ILO Right to Organise and Collective Bargaining Convention no. 98 art. 4 (1949).
- EU legislators have to **respect the autonomy of social partners**: According to the Treaty on the functioning of the European Union (TFEU) art. 153, the EU shall solely support and complement the activities of the Member States with regards to social and labour law. Art. 153 para. 5 TFEU states that the EU has no competence to regulate pay and the right to organise. The future revision of the EU public procurement directive must respect employers' freedom of association.



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